NO. 52236

106 I.A.2d 286

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

J. EDWARD JONES, as Managing beneficiary Trust No. 10215 of Guaranty Bank & Trust Company, etc., Plaintiff-Appellant,	Appeal from the Circuit Court of Cook County.
vs.	Honorable Edward G. Schultz, Judge Presiding.
JOSEPH G. ENGERT and HOWARD FREEDBERG, as co-partners doing business as NORTHWESTERN FINANCE COMPANY, Defendants-Appellees.	

Goldenhersh, P. J.

Plaintiff appeals from the judgment of the Circuit Court of Cook County dismissing his action at his costs. The trial court allowed defendants' motion to strike the complaint, as amended, plaintiff elected to stand on the pleading, and judgment was entered. Several days after entry of the order of dismissal plaintiff moved that the order be amended to show that Lehman E. Parrish, hereafter called Parrish, and Hobart A. Dawes, hereafter called Dawes, be made additional parties defendant and summons issue directed to said defendants. The court denied the motion, and this appeal followed.

Count I of plaintiff's complaint, as amended by interlineation, alleges that plaintiff brings the action as managing beneficiary of Trust No. 10215 of Guaranty Bank & Trust Company, hereafter called Guaranty; defendants as co-partners were in the business of financing construction of buildings; Parrish induced plaintiff to join in the erection of an apartment building on land then owned by a church

which agreed to sell the parcel of land to plaintiff, Parrish and Dawes, a business associate of Parrish, for the sum of $3,500.00, $500.00 to be paid at the time of conveyance, the balance to be secured by a "vendor's lien"; plaintiff, Parrish and Dawes, as joint adventurers, spoke with defendant, Freedberg, for the purpose of borrowing $18,000.00; Freedberg advised them he and his partner, defendant, Engert, would lend them $18,000.00 for a period of six months, if they would convey the real estate, in trust, to Guaranty, and direct it to execute a note and trust deed in the amount of $20,000.00, the note to be payable in six months, with interest at the rate of seven per cent per annum; Parrish and Dawes, as contractors, agreed to erect the duplex; the property was conveyed to Guaranty in trust; plaintiff and Parrish as managing beneficiaries directed Guaranty to execute the note and deed of trust in the amount and upon the terms described; plaintiff and Parrish agreed to indemnify Guaranty for any loss or expense; it became apparent the funds borrowed were not sufficient to complete the building; defendants agreed to lend an additional $3,150.00, provided plaintiff, Dawes and Parrish assigned to defendant the beneficial interest in said trust; plaintiff, Dawes and Parrish "under duress for fear of losing said property" executed the assignment "for security purposes only"; "in order to save said property and make it merchantable and prevent injury to the trust property and to the beneficiaries". Defendants, upon execution of a note in the principal sum of $3,500.00 lent an additional sum of $3,150.00; the duplex was completed and sold to two buyers; defendants have received $22,409.53, and second mortgages totalling $7,400.00; defendants charged interest to the date of closing of the sale of the duplex, and on that date converted the cash and mortgages to their own use; under

the provisions of Ch. 74, secs. 4 and 8, Ill. Rev. Stat. 1959 defendants are not entitled to any interest on the loans "the consideration therefor being illegal and wholly failed"; plaintiff has incurred expenses in prosecuting this action; Parrish as the other managing beneficiary refused to join as a party plaintiff in bringing this action; Guaranty, as trustee, has refused to bring this action. Plaintiff prays judgment for $9,159.53 interest and costs.

In Count II plaintiff alleges defendant, Engert, was a party litigant in Engert v. Chicago Title and Trust Company, 335 Ill. App. 566, defendants therefore knew the instant transaction was usurious, but continued to make such loans "with indifference to the rights of the borrowers or damage to them"; defendants converted money and mortgages; and prays judgment for the total of enumerated sums and punitive damages.

Attached to the complaint, and by reference incorporated therein, are the trust agreement between Guaranty and the beneficiaries, the direction to Guaranty to execute the note in the sum of $20,000.00, the note and the trust deed securing it, and the assignment of the beneficial interest under the trust.

In our review of whether the trial court erred in dismissing the action, we are guided by the rule enunciated in Herman v. Prudence Mutual Casualty Company, 92 Ill. App. 2d 222, wherein the court said at page 232, "The cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle plaintiff to recover."

The complaint alleges that upon the sale of the duplex, defendants received cash in excess of the sums due them, second mortgages, and the notes which they secured. Plaintiff alleges that the retention

by defendants of the cash in excess of the indebtedness, and the securities, was wrongful, and defendants are guilty of conversion. The facts alleged must be taken as true, and an action will lie for such conversion. Knight v. Seney, 290 Ill. 11.

Defendant argues that assuming, arguendo, the interest was usurious, the payments were voluntary and plaintiff cannot recover them. We do not construe the complaint to seek recovery of the interest paid, and the issues of usury, and the voluntariness of the payments, are fact issues which are material to the question of whether, by retaining the money and securities, defendants were guilty of conversion.

Defendant contends that only the title holder, and not the cestui que trust, can maintain an action in conversion. From our examination of the terms of the trust agreement we are not prepared to say that because title to the real estate was vested in the corporate trustee, it continued to own the cash and securities derived from its sale. Parrish, Dawes, and Guaranty, assuming them to be necessary plaintiffs, by virtue of their refusal to join as plaintiffs, can be joined as defendants, Ch. 110, sec. 23, Ill. Rev. Stat. 1967.

Defendant argues further that the plaintiff does not allege a demand for the money or securities. An examination of the authorities collected at 35 Illinois Law and Practice 149, demonstrates that there are many situations where conversion may be shown without proof of a demand for, and a refusal to return the property.

From our examination of the pleadings and the authorities, we are not prepared to say that plaintiff cannot prove a set of facts which will entitle him to relief.

[1.] For the reasons set forth, the judgment is reversed and the cause is remanded to the Circuit Court of Cook County with directions to vacate the order of dismissal, and for further proceedings not inconsistent with this opinion.

Judgment reversed and
cause remanded.

Concur: George J. Moran

Concur: Edward C. Eberspacher

(A)

52970

106 I.A.2 215

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. TOMMIE MITCHELL, otherwise called MICHAEL P. LEE, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. L. Sheldon Brown, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In two separate indictments, charging crimes which occurred on two separate occasions, Tommie Mitchell, a/k/a Michael P. Lee, and others were charged with aggravated battery and armed robbery. At his arraignment the accused pleaded not guilty to both crimes and the indictments were consolidated for trial. On the day of his trial, the defendant withdrew his prior plea of not guilty, pleaded guilty to both offenses and applied for probation. After hearing stipulated evidence regarding both crimes, which evidence is not included in the record before us, and holding a hearing in aggravation and mitigation, the court entered concurrent identical sentences for both offenses; namely, five years probation with the first year to be served in the House of Correction of the City of Chicago as a condition of probation. The time spent in the County Jail awaiting trial was to be deducted from the one year incarceration.

In this appeal, which is addressed only to the aggravated battery offense, the defendant seeks a reduction of his maximum sentence to 2-1/2 years probation and urges four grounds in support of his position: (1) the trial court was of the erroneous impression that the type of aggravated battery for which the defendant was indicted, striking a police officer with a fist while the officer was making an arrest, carried a sentence within the range of one to ten years whereas, by statute, the range of

punishment was one to five years; (2) the statement by the state's attorney at the hearing in aggravation and mitigation that the accused had once been charged with attempted robbery which had been "nolled" was improper and prejudicial; (3) the accused's co-indictee on the aggravated battery charge received one year probation for the same offense; (4) reduction of sentences by reviewing courts have been made in cases of a much more serious nature than the instant one. The defendant is also separately appealing his sentence pertaining to the armed robbery offense. See the accompanying opinion of People v. Mitchell, App. Ct. No. 53047, filed today.

The record in the instant case indicates that the trial court, before accepting this change in plea from not guilty to guilty, advised the defendant of his right to a jury trial, which would be waived if he pleaded guilty and also told him that the range of punishment for this crime was one to ten years. In this latter admonition the trial court was in error. It intermingled two separate sections of the aggravated battery offense found in our Criminal Code. Ill. Rev. Stat. (1967), ch. 38, §12-4 (a), is one species of aggravated battery which statutorily defines the common law crime of mayhem and which may be either a misdemeanor or a felony depending upon the sentence imposed. The maximum range of sentence is from one to ten years in the penitentiary. However, the defendant was indicted for another species of aggravated battery, namely, a violation of Ill. Rev. Stat. (1967), ch. 38, §12-4 (b) (6), which involves a battery committed upon a peace officer who at the time is executing any of his official duties, including arrest or attempted arrest and who is known to the defendant to be a police officer. This offense too can be either a misdemeanor or a felony depending upon the sentence imposed, but the maximum range of sentence is one to five years.

The defendant was represented by appointed counsel during all stages of the criminal proceedings against him. No one brought the error of the trial court to its attention. The defendant persisted in his plea, his age was shown to be twenty-nine, and a judgment of guilty was entered.

No witnesses were called at the subsequent hearing in aggravation and mitigation. The state's attorney noted that the defendant did have a past criminal record. He stated that approximately three years earlier, the State had "nolled" an indictment for attempted robbery and the defendant was sentenced to one year in the House of Correction for aggravated battery. Less than a year later, the defendant was convicted of aggravated assault and fined $40.00. Two months after this, he was convicted of resisting arrest and fined $50.00. The instant prosecution involved another act of violence committed by the defendant upon another individual. In conclusion, the State recommended a sentence of one to three years in the penitentiary.

In mitigation, defense counsel stated that the defendant was now contrite, as evidenced by his plea of guilty, and he was intoxicated at the time of the aggravated battery. Continuing, defense counsel stated that this inclination to intoxicating liquors had been the root of most of the defendant's problems in the past. Furthermore, his co-indictee on the aggravated battery charge had received one year probation. In conclusion, defense counsel recommended either a sentence of one year to one year and a day in the penitentiary or a period of time on probation with the first six months to be spent incarcerated in a penal institution other than the penitentiary.

In this appeal, we are asked to use the power now given reviewing courts by Illinois Supreme Court Rule 615 (b) (4) [Ill. Rev. Stat. (1967), ch. 110A, §615 (b) (4)] to reduce the maximum

punishment imposed on the defendant in this case from 5 years probation to 2-1/2 years probation. Neither a pre-sentence investigation report nor a probation report is included in the record before us. No issue is taken with the minimum punishment imposed, namely, one year in the House of Correction as a condition of probation.

The defendant does contend, however, that his maximum punishment should be halved because the trial court was of the erroneous impression that the maximum punishment that could be imposed upon the defendant was one to ten years whereas, when in fact, it was one to five years. We are of the opinion that a sentence of five years probation, within the facts of this case, best serves to protect the interests of society and aid the defendant in hopefully gaining his rehabilitation. The defendant filed an application for probation, which is made a part of this record, indicating that he was single, lived alone, and apparently did not have steady employment. Furthermore, the hearing in aggravation and mitigation disclosed that the defendant was twenty-nine, did have a past criminal record consisting of crimes of physical violence, which is also involved in the case at bar, and drank to excess. Although the trial court did impose the maximum period of probation, five years, provided by our probation laws, [Ill. Rev. Stat. (1967), ch. 38, §117-1 (b)], we find no reason to disturb this exercise of judicial discretion. During this period of probation for five years, the defendant will be under the continuing jurisdiction of the trial court [Ill. Rev. Stat. (1967), ch. 38, §117-1 (c)] and perhaps his rehabilitation can be gained through steady employment and the defeat of his intoxication problem which apparently causes his acts of physical violence upon others. See People v. Lillie, 79 Ill. App. 2d 174, 178, 223 N.E. 2d 716 (1967).

The defendant also contends that the maximum period of probation should be reduced because of an alleged improper and prejudicial comment by the state's attorney at the hearing in aggravation and mitigation. Our review of the record indicates that the prosecutor did in fact mention that the State had "nolled" an indictment for armed robbery but as part of the same statement mentioned that the defendant was sentenced to one year in the House of Correction for aggravated battery. This comment was proper as it indicated to the court that the defendant had apparently entered into a negotiated plea to a lesser offense under which the State "nolled" the felony indictment and the defendant accepted the shorter imprisonment for aggravated battery. The aggravated battery and the armed robbery with which defendant was then charged might have been part of one act of criminal conduct. It was proper for the court to be informed of this as it showed the defendant's past criminal record, one of the relevant factors to be considered by the trial court before sentencing. See Ill. Rev. Stat. (1967), ch. 38, §1-7 (g). The cases cited by the defendant in support of his contention, People v. Grigsby, 75 Ill. App. 2d 184, 220 N.E. 2d 498 (1966) and People v. Crable, 80 Ill. App. 2d 243, 225 N.E. 2d 76 (1967), are clearly distinguishable.

Thirdly, the defendant contends that his sentence should be reduced because his co-defendant only received a sentence of probation for one year. The co-defendant's hearing in aggravation and mitigation is not made a part of the instant record. Therefore, we cannot determine if this disparity of sentence was, in fact, an abuse of discretion. Perhaps the co-defendant's lighter sentence can be explained on the basis of youth, no criminal record, steady employment, or passive participation in the offense. We will not interfere with the exercise of discretion by the trial court in

sentencing unless the record demonstrates an abuse of discretion. Since the co-defendant's hearing in aggravation and mitigation is not included in the present record, this contention of the defendant cannot prevail.

Finally, the defendant urges that there is ample authority for the reduction of sentences by reviewing courts and such reductions have been made in cases of much more serious nature. After a careful consideration of the cases cited by the defendant in support of this contention, we adhere to our opinion that a term of five years probation best serves the interests of society and the defendant. It is true that the defendant might be sentenced to the penitentiary for a period of five years for violation of probation occurring within four years after his release from the House of Correction, but he himself would be responsible for this. In light of his past criminal record and his drinking problem, his best opportunity for possible rehabilitation rests with his remaining subject to the continuing jurisdiction of the trial court for five years probation and not two and one-half years.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

53047

106 I.A. 2 210

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
TOMMIE LEE MITCHELL (Impleaded),	)	Hon. L. Sheldon Brown, Presiding.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of guilty of armed robbery and a sentence of five years probation. At his arraignment, the defendant pleaded not guilty. At a separate arraignment for another crime which occurred on an apparently different date, the defendant also pleaded not guilty to the charge of aggravated battery. Both indictments were consolidated for trial. On the day of his trial and after a pre-trial conference which included the court, the accused, and opposing counsel, the defendant withdrew his plea of not guilty, pleaded guilty to both offenses, and applied for probation. After hearing stipulated evidence regarding both crimes, which evidence is not included in the record before us, and holding a hearing in aggravation and mitigation, the court entered concurrent identical sentences for both offenses; namely, five years probation, with the first year to be served in the House of Correction of the City of Chicago as a condition of probation. The time spent in the County Jail awaiting trial was to be deducted from the one year incarceration.

In this appeal, which is addressed only to the armed robbery offense, the defendant seeks a reduction of his maximum sentence to 2-1/2 years probation and urges three grounds in support of his position: (1) the trial court was of the erroneous impression that the other offense to which defendant pleaded guilty (i.e., aggravated battery) was more serious than it was in

fact; (2) the statement by the state's attorney at the hearing in aggravation and mitigation that the accused had once been charged with attempted robbery which had been "nolled" was improper and prejudicial; (3) reduction of sentences by reviewing courts have been made in cases of a much more serious nature than the instant one. The defendant is also separately appealing his sentence pertaining to the aggravated battery offense. See the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today.

The record indicates that the trial court heard both cases, armed robbery and aggravated battery, at the same time. The facts are set out in fullest detail in the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today. Suffice to say, for purposes of this opinion, that after being advised of the defendant's election to change his plea from not guilty to guilty of both crimes, the trial court informed the defendant that in so doing he waived a trial by jury. Furthermore, the court correctly informed the defendant as to the minimum-maximum sentence for armed robbery but erroneously advised him of the minimum-maximum sentence for aggravated battery stating it to be one to ten years whereas, in fact, it was one to five years for the type of aggravated battery charged in the instant indictment.

The defendant had struck a police officer who was acting in the line of duty, and the defendant knew the person assailed to be a police officer. (This appears only in the State's statement of facts). The punishment for this offense may be up to one year in a penal institution other than a penitentiary or one to five years in the penitentiary. See Ill. Rev. Stat. (1967), ch. 38, §12-4 (b) (6). The accused, by striking the police officer with his fist, had not inflicted permanent disability, disfigurement, or great bodily harm for which the punishment is up to one year in

a penal institution other than a penitentiary or from one to ten years in the penitentiary. See Ill. Rev. Stat. (1967), ch. 38, §12-4 (a).

The defendant was represented by appointed counsel during all stages of the criminal proceedings against him. No one brought this error of the trial court to its attention. The defendant persisted in his plea, his age was shown to be twenty-nine, and a judgment of guilty was entered.

A hearing in aggravation and mitigation was held concurrently for both offenses. No witnesses were called by either side. Full details are given in the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today. During this hearing, the prosecutor mentioned that the State had "nolled" a robbery indictment, and the defendant had been sentenced to one year in the House of Correction for aggravated battery. In mitigation, defense counsel stated that the defendant was now contrite, as evidenced by his plea of guilty. As to the armed robbery, counsel mentioned that the defendant did not have a gun at any time and his role in the crime was a secondary or minor one. In conclusion, he recommended either a sentence of one year to one year and a day in the penitentiary or a period of time on probation with the first six months to be spent incarcerated in a penal institution other than the penitentiary.

In this appeal, we are asked to use the power now given reviewing courts by Illinois Supreme Court Rule 615 (b) (4) [Ill. Rev. Stat. (1967), ch. 110A, §615 (b) (4)] to reduce the maximum punishment imposed on the defendant in this case from 5 years probation to 2-1/2 years probation. Neither a pre-sentence investigation report nor a probation report is included in the record before us. No issue is taken with the minimum punishment imposed,

namely, one year in the House of Correction as a condition of probation.

The defendant does contend, however, that his maximum punishment should be halved because the trial court was of the erroneous impression that the maximum punishment that could be imposed upon the defendant for the crime of aggravated battery, which hearing was heard at the same time as the hearing on armed robbery, was one to ten years. In fact, the maximum sentence range was one to five years. The state's attorney contends that in the instant appeal the defendant urges only that the sentence imposed upon him for armed robbery was too harsh. Therefore, any allegation as to the sentence imposed for aggravated battery is not relevant. Although we do not agree with this contention of the State since both indictments were tried at one time resulting in identical judgments and identical sentences, we are of the opinion that a sentence of five years probation, within the facts of this case, best protects the interests of society and aids the defendant in hopefully gaining his rehabilitation. We give our reasons more fully along with more supporting facts in the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today.

The parties entered into a stipulation of evidence regarding the armed robbery offense which is not included in the record before us. However, the State in its brief offered the full facts of the crime and defendant's counsel did not take issue with their accuracy. Briefly, it can be stated that the defendant, his uncle, and the complaining witness left a tavern together in the early hours of the morning whereupon the uncle produced a gun and demanded money. The complaining witness gave him $9.00 and the defendant took an expensive Omega watch which the complaining witness

had been wearing. At this point in time, police officers arrived and arrested the defendant and his uncle. The armed robbery indictment and trial ensued. It can be seen that the defendant was an active participant in this armed robbery, seeking its benefits. The sentence was lenient. The defendant was not prejudiced by a sentence of five years probation in light of the fact that he could have been sentenced to an indeterminate term in the penitentiary for his active role in this crime. See Ill. Rev. Stat. (1967), ch. 38, §18-2 (b).

The second contention of the defendant and our reply to it is given in full detail in the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today. Suffice to say that no error occurred in the hearing in aggravation and mitigation. The trial court was merely being advised of the defendant's past criminal record pursuant to Ill. Rev. Stat. (1967), ch. 38, §1-7 (g). This did not involve a case in which the trial court was advised of arrests followed by no subsequent convictions as occurred in People v. Grigsby, 75 Ill. App. 2d 184, 220 N.E. 2d 498 (1966), or placed its reliance in sentencing upon other incompetent material such as a prior incarceration under the Family Court Act offered in aggravation which occurred in People v. Crable, 80 Ill. App. 2d 243, 225 N.E. 2d 76 (1967). These cases are cited by the defendant in support of his second contention, but they are clearly distinguishable from the case at bar. Here, the prosecutor advised the court of an apparent negotiated plea to a lesser offense as the State "nolled" a felony indictment for attempted robbery and the defendant received a shorter misdemeanor punishment for aggravated battery. The aggravated battery and the armed robbery with which defendant was then charged might have been part of one act of criminal conduct. Thus, we do not agree with this contention of the defendant.

The last contention of the defendant was fully answered in the accompanying opinion of People v. Mitchell, App. Ct. No. 52970, filed today. To repeat it here would serve no useful purpose. Suffice to say that we adhere to our opinion that a term of five years probation, with the first year to be served in the House of Correction as a condition of probation, best serves the interests of society and aids the defendant in gaining his rehabilitation.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur

52495

CITY OF CHICAGO, a municipal corporation,

Plaintiff-Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, Trustee under Trust No. 37335 and Deed in Trust, dated February 1, 1955, OSCAR W. BERKSON and UNKNOWN OWNERS,

Defendants.

OSCAR W. BERKSON, MARSHALL BERKSON, SYLVIA BERKSON and CHICAGO TITLE AND TRUST COMPANY, Trustee,

Defendants-Appellees.

APPEAL FROM

CIRCUIT COURT OF COOK COUNTY,

COUNTY DEPARTMENT,

CHANCERY DIVISION.

Honorable Alvin J. Kvistad,
Judge Presiding.

MR. JUSTICE CRAVEN DELIVERED THE OPINION OF THE COURT.

The city of Chicago instituted proceedings in chancery, pursuant to the provisions of sections 11-31-1, 11-31-2 and 11-13-15 of the Cities and Villages Act (Ill.Rev.Stat.1965, ch. 24, paras. 11-31-1, 11-31-2, 11-13-15), for the demolition of certain property on West 63rd Street in the city of Chicago. The complaint alleged that the Chicago Title and Trust Company, as trustee, Oscar Berkson and unknown owners were the owners or had some interest in the described property. The original complaint sought authority for demolition and a lien on the premises for the costs of the demolition.

The following chronology of events is material. An affidavit for publication was signed on March 14, 1966, with reference to unknown owners, but in the affidavit the last-known place of residence of Oscar W. Berkson was indicated to be at a certain street address in Miami, Florida. On March 21, 1966, a summons was filed, the return indicating proof of service on Chicago Title and Trust on March 16. Certificates of mailing notice were filed by the circuit clerk, indicating a notice having been mailed to Oscar W. Berkson at the Miami address. On March 31, a certificate of publication in the Chicago Daily Law Bulletin

was filed indicating publication on March 16, 23 and 30. On April 6, 1966, a summons was filed, the return indicating personal service on Oscar W. Berkson on March 30 by the sheriff of Dade County, Florida. On April 26, an order of default was entered against the defendants Oscar W. Berkson and unknown owners, and on May 13, 1966, a decree for demolition was entered. On June 7, 1966, an appearance was entered by the defendant Oscar W. Berkson and subsequently by the defendants Marshall Berkson and Sylvia Berkson, and on that date an answer was filed by the defendant Marshall Berkson. On July 21, 1966, there was a motion by Oscar Berkson for an order vacating the decree for demolition. After numerous continuances, an order was entered in March of 1967, vacating and setting aside the decree, and subsequently an order was entered denying the motion to vacate the March, 1967, order.

We agree with the appellant that the record in this case is unnecessarily confused by a nunc pro tunc practice for which we see no justification. Almost invariably orders of the court appear to be filed on one date, dated on another date, and then in addition entered by the trial court, nunc pro tunc, for a date one or two weeks preceding either date. As we view this record, we find no need for the nunc pro tunc practice reflected therein. See: In re Bird's Est., 410 Ill. 390, 102 N.E.2d 329 (1951); Chapman, Mazza, Aiello, Inc. v. Ace Lumber & Constr. Co., 83 Ill. App. 2d 320, 227 N.E.2d 562 (2d Dist. 1967).

The city of Chicago filed a notice of appeal and asserts that the trial court was lacking authority to vacate its order for demolition. On July 21, 1966, at the time of the filing of the motion to vacate the order for demolition, the defendant Oscar Berkson sought to restrain the demolition pending disposition of the motion. The record in this case indicates that the improvements on the premises were, in fact, demolished some two weeks before the motion to vacate.

[1] We turn first to the question of the jurisdiction of this court to entertain this appeal. A motion to dismiss the appeal was filed by the defendants-appellees asserting that all claims,

rights and liabilities of the parties have not been adjudicated. That motion to dismiss the appeal was denied. It is our opinion that we do not have jurisdiction to entertain this appeal for want of a final appealable order--a necessary condition precedent to appellate review.

In City of Chicago v. Bah, __ Ill. App. 2d ___, 241 N.E.2d 640 (1st Dist. 1968) (leave to appeal denied January 28, 1969), this court, in considering a similar case, concluded that an order vacating a decree for demolition in a case wherein no service was had upon the defendant was not an appealable order and dismissed the appeal. We feel compelled to do likewise.

In this case the order of default was entered less than thirty days after service of summons on the defendant. The circuit court properly, under the circumstances, vacated its order. This cause is still pending in the circuit court of Cook County upon the original complaint and the subsequently filed counterclaim of the defendants seeking damages for demolition of the structure.

So far as is relevant to the issue here presented, we see no distinction between the proceeding in the circuit court wherein there has been no service on the defendants and this proceeding wherein the order of default was obtained prior to the return date established by the personal service on the defendant Oscar W. Berkson. The later order for demolition was based on that default. In this case the complaint alleged that the defendant Oscar Berkson had an interest in the premises; his address--or at least his last-known address--was established in the record; and the statute provides for notice by other than personal service "Where, upon diligent search, the identity or whereabouts of the owner or owners of any such building shall not be ascertainable, ..."

The discussion by the court in the Bah case relevant to mootness and the application of section 72 of the Practice Act is applicable here. This appeal is dismissed for want of a final appealable order.

APPEAL DISMISSED.

TRAPP, P.J. and SMITH, J., concur.

No. 68 - 127 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

106 I.A. 2 3604

MARTIN F. BROWN and CATHERINE BROWN,	)	
Plaintiffs-Appellees,	)	
v.	)	Appeal from the Circuit Court for the 18th Judicial Circuit, DuPage County
FARMERS AUTOMOBILE INSURANCE ASSOCIATION, an Illinois corporation,	)	
Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Circuit Court of DuPage County. After a bench trial, the trial court entered a judgment in favor of the plaintiffs and against defendant in the amount of $460.00 plus costs. The issues raised by this appeal are whether the trial court erred in its determination that the policy of insurance sued upon should be construed strictly in favor of the insured and whether the policy was ambiguous. A further issue is whether the trial court erred as a matter of law in holding that the facts as testified to by the plaintiffs were within the coverage extended by the policy and whether such judgment is not contrary to the evidence.

Defendant, within the time prescribed, filed a brief, abstract and transcript of record. The plaintiffs have filed no brief nor have they appeared before this court. As this court recently held in Shankoltzer v. McDaniel, 97 Ill. App. 2d 81 (abst.) it has long been the rule that where the appellee fails to file a brief as provided by the rules, the court

need not examine the record in detail nor discuss the case at length, rather it is justified in reversing the decision of the lower court and remanding the case for further proceedings. However, reversing the case is not required and the Appellate Court within its discretion may consider and determine the case on its merits. Spears v. Spears, 45 Ill. App. 2d 167, 170. The appellant has specificially requested this court to decide this case on its merits and we believe that this is a proper case to exercise this discretion.

Martin F. and Catherine Brown, plaintiffs, were issued a Homeowners policy by Farmers Automobile Insurance Company, defendant, insuring the premises located at 336 Vine Street, West Chicago, including unscheduled personal property. This policy was issued effective February 3, 1966, to expire February 3, 1969. Paragraph 15 of the policy provided coverage for:

> " . . . accidental discharge, leakage or overflow of water or steam from within a plumbing, heating, or air conditioning system or domestic appliance . . "

Under a section headed "Special Exclusions", the policy provided in part:

> "This Company shall not be liable:
> (b) as respects Perils . . 15 . .: for loss caused by, resulting from, contributed to or aggravated by any of the following:
> (2) water which backs up through sewers or drains;"

On or about June 10, 1967, while said policy was in full force and effect, the insured sustained a loss in certain personal property covered by the policy, whichloss was caused by a sewer backing

up in the basement and damaging certain furniture, appliances and other property of plaintiffs. On June 10, 1967, West Chicago experienced an unusually heavy rainfall. As a result of this, the sewer located in plaintiffs' basement backed up causing the damages complained of. The plaintiffs have made claim against defendant for the damages in accordance with the terms of the policy. The defendant denied the claim. Thereafter plaintiffs filed suit, basing their complaint on the provisions of paragraph 15 of the "Perils Insured Against" portion of the policy. The cause was defended on the basis of the special exclusions section set forth therein. The trial was held before the court without a jury on April 30, 1968, and on July 2, 1968, judgment was entered in favor of the plaintiffs and against the defendant as aforesaid.

An insurance contract should be construed in accordance with the general contract rule of construction that the agreement should be ascertained as a whole to determine the intention of the parties and the purpose which they sought to accomplish. The parties to an insurance contract are free to incorporate such provisions into it, if not unlawful, as they see fit and it is then the duty of the court to enforce those provisions. The well known rule that an ambiguity in an insurance policy will be construed most strongly against the insurance company as the party that drafted the policy only has application where an ambiguity in fact exists and a court may not distort the contract to create the ambiguity itself. Nationwide Ins. Co. v. Ervin, 87 Ill. App. 2d 432, 435. In construing a policy of insurance, courts should consider the instrument as a whole, and endeavor to ascertain the intention of the

parties, the nature of the subject matter with which they are dealing, and the purpose which the parties sought to accomplish. Courts can have no function but to ascertain and enforce the intention of the parties to the contract and must not inject terms and conditions different from those agreed upon by the parties. Cook v. Suburban Cas. Co., 54 Ill. App. 2d 190, 196. The terms used in the contract are to be understood according to their plain, ordinary and popular sense. Walsh v. State Farm Mut. Auto. Ins. Co., 91 Ill. App. 2d 156, 160. The language of an insurance policy is not ambiguous because a word or phrase isolated from the context of the whole is susceptible of more than one meaning, or because in context it is susceptible of one reasonable and one unreasonable meaning. Dodge v. Allstate Ins. Co., 89 Ill. App. 2d 405, 407. In Wasson v. Insurance Co. of North America, 25 Ill. App. 2d 35, 36, the policy provided for coverage of windstorm damage, but expressly excluded damage caused by rain, whether driven by wind or not "unless the buildings covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind . . . and then shall be liable for loss to the interior of the buildings or the property covered therein as may be caused by rain . . . entering the buildings through openings in the roof or walls made by direct action of wind". Plaintiff had suffered some wind damage but the evidence did not disclose that the interior damage caused by rain had entered the dwelling through an opening made in the roof or walls by direct action of the wind. The court had no difficulty in interpreting the meaning and the terms of this policy and held for the defendant that it was not liable for damage done by the rainwater.

Similarly, in this case we believe the policy is clear and unambiguous insofar as it provides that the company shall not be

liable "for loss caused by, resulting from, contributed to or aggravated by . . . water which backs up through sewers or drains". It is clear from the evidence before us that plaintiffs' damage was as a result of water backing up through sewers or drains as a result of a severely heavy rainstorm on the day in question.

For these reasons the judgment of the trial court must be reversed.

JUDGMENT REVERSED.

MORAN, P. J. and SEIDENFELD, J. concur.

51945

PETER CONGIARDO,	)	APPEAL FROM
	)	
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	
v.	)	COOK COUNTY.
	)	
TONY BORDENARO, SR., and TONY BORDENARO, JR.,	)	106 I.A. 374
	)	Honorable
	)	Abraham W. Brussell,
Defendants-Appellants.	)	Presiding.

MR. PRESIDING JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered against defendants on a jury verdict of $2,500 in a suit for personal injuries. Defendants contend (1) that the verdict and judgment were against the manifest weight of the evidence, (2) that the conduct of plaintiff's counsel during trial and in closing argument was improper and prejudicial to the rights of the defendants to a fair trial, and (3) that the verdict of the jury was grossly excessive and not based upon any competent medical testimony.

The following facts are not disputed. Plaintiff was injured when a car driven by Tony Bordenaro, Jr., (hereinafter referred to as Tony Jr.) in which plaintiff was riding, was involved in a collision with another automobile in the intersection of Roosevelt Road and Morgan Street. Roosevelt Road (1200 South) is four lanes wide and divided by a concrete divider; it runs east and west. Morgan Street (1000 West) runs north and south; it is a two-way street with parking allowed on both sides, and it is wide enough for cars going in opposite directions to pass safely. The intersection of Roosevelt and Morgan is controlled by a stoplight. The collision took place at 8:00 A.M. on Sunday, September 11, 1960.

EVIDENCE

Testimony of Peter Congiardo, plaintiff

Early on the morning of Sunday, September 11, 1960, he was in front of his house at 1903 West Race Street working on a truck belonging to Tony Bordenaro, Sr. (hereinafter referred to as

Tony Sr.). Plaintiff was putting a new muffler on the truck and giving it a tune-up. Tony Jr. drove up in his car and told plaintiff that another Bordenaro truck had broken down; he asked plaintiff to come along with him and fix it. Tony Sr. drove up shortly after Tony Jr. arrived and parked behind him. Plaintiff got out from underneath the truck and got into Tony Jr.'s car with his tools.

After leaving plaintiff's house Tony Jr. cut off at Wolcott Avenue and then drove down Ashland Avenue. He cut in and out of a few streets in an effort to lose his father and eventually ended up going south on Morgan Street. He was attempting to lose his father because he was late after having fallen asleep in his car on his way to pick up plaintiff.

Tony Jr. was going fifty, fifty-five miles per hour on Ashland, and plaintiff said to him: "Take it easy, take it easy, are you crazy?" Plaintiff did not try to get out of the car nor did he tell Tony Jr. that he wanted to get out of the car. Plaintiff does not know how many blocks they travelled on Morgan Street before reaching the intersection with Roosevelt Road. Nor does plaintiff know the speed limit on Morgan, although the six blocks to the north of Roosevelt are residential and Morgan is a through street.

As the car approached Roosevelt Road plaintiff saw the stoplight change to amber; he then looked at the speedometer which registered seventy-two miles per hour. Plaintiff said to Tony Jr.: "Snooky. Watch the light, you ain't going to make it." Tony Jr. replied: "We'll make it." When the car entered the intersection the light was amber, and it turned to red as the car was halfway across. Plaintiff saw the other car and called out: "Watch the Buick!" The cars collided and plaintiff does not remember anything else until he regained

consciousness at the hospital. Tony Jr. was going straight across Roosevelt Road; he was not going to make any turn.

After the collision plaintiff was taken to Illinois Research Hospital where he had sixty-seven stitches put in the back of his head. These stitches left a scar (which was shown to the jury). During cold weather the scar swells up but then goes down after plaintiff remains in a warm place for awhile. Tony Jr. paid the Illinois Research Hospital bill of $6; he also offered plaintiff $100 which plaintiff refused.

Plaintiff received treatment from his family doctor for awhile and then went to the Veterans Administration as an outpatient. There is no charge for the services of the Veterans Administration. Plaintiff had his head and neck treated, received physiotherapy and bought a $10.35 cervical collar.

Prior to the accident plaintiff would get headaches about once a month "like everybody else." Subsequent to the accident and until the present time plaintiff gets headaches about three times a week. He takes aspirin and occasionally a codeine base pill to relieve the pain. For about a year after the accident plaintiff would suffer a severe shock whenever he turned his head quickly; at the present time this condition has disappeared. Anthony Bordenaro, Jr., a defendant, called by plaintiff as an adverse witness under Section 60 of the Civil Practice Act, Ill. Rev. Stat., 1961, ch. 110, § 60.

When he arrived at plaintiff's house plaintiff was working on one of Tony Sr.'s trucks. Tony Jr. had gone to plaintiff's house because the other Bordenaro truck had broken down. At the time of the accident he was going to the other broken truck which was at 14th and Jefferson Streets; he was not taking plaintiff to fix that truck. He had only gone to get plaintiff's tools so that his brother Jimmy Bordenaro could fix the truck.

They were going to use plaintiff's tools because there are no tools at the Bordenaro store and Jimmy lives too far away to get his tools quickly. Jimmy fixes all the Bordenaro vehicles. Tony Sr. did not tell Tony Jr. to go and get the plaintiff.

From plaintiff's house Tony Jr. drove to Grand Avenue, then to Peoria, then to Harrison, down Harrison to Morgan, and then down Morgan to Roosevelt Road. Tony was going to make a left turn onto Roosevelt Road. At the moment of impact Tony Jr.'s car was stopped and he was waiting to make a left turn onto Roosevelt. Tony Jr. was knocked unconscious by the collision.

Tony Jr.'s car was damaged in the collision. There was damage to the grille on the right side and to the right headlight; there was also a scraping on the right side. There was no damage to the entire front side nor to the continental kit on the back of the car. Tony Jr. admitted testifying at a deposition on March 1, 1962, but did not remember giving the following answers to the following questions:

> Q. Was he [plaintiff] a mechanic?
>
> A. Yes, on Randolph and Peoria, so in the meantime I went from 14th and Jefferson where my father was. So my father asked me to go pick him up, and see, our wheels were stuck on the truck, so in the meantime, my father told me to go pick him up, so I went to Randolph and Peoria and picked him up and brought him back.
>
> * * *
>
> Q. Was it your intention to proceed in a southerly direction across Roosevelt?
>
> A. Yes.
>
> * * *
>
> Q. Now, you refer to the quarter panel and to the rear. This is a little confusing because they can be construed as the same.
>
> A. I had a continental kit, and it buckled a little.
>
> Q. The continental kit itself was damaged?
>
> A. Yes, sir.

He stated that his memory was better on March 1, 1962, than it was at the time of trial (1966).

Testimony of Dolores K. Wilson, called by plaintiff

She is a court reporter who takes shorthand notes in court and on deposition and transcribes them. She writes machine shorthand and can take a minimum of 200 words per minute.

On March 1, 1962, at 2:00 P.M. she took stenographic notes at a deposition of Tony Bordenaro, Jr. At that time Mr. Bordenaro testified under oath. She then read back from her transcript the questions and answers quoted above in the summary of the testimony of Tony Jr.

THE DEFENSE

Testimony of Anthony Bordenaro, Jr., a defendant

On the day of the accident at 7:00 or 7:30 A.M. he was following his father's (Tony Sr.'s) truck to the stand where Tony Sr. sells fruit on Sundays when the truck broke down with a malfunction of the steering mechanism. Several people pushed the truck to the fruit stand and then either Tony Sr. or Jimmy told Tony Jr. to go and get some tools so that Jimmy could fix the truck. Tony Sr. did not send him to get the plaintiff; Tony Jr. was sent only to get some tools. Tony Jr. was again confronted with a contradictory statement from his deposition but he does not remember making the statement.

There are no tools at the fruit stand or at the store and Jimmy lives over twenty miles away, so Tony Jr. went to plaintiff's house to get some tools. He arrived at plaintiff's house at 7:35 and found him working under the hood of one of Tony Sr.'s trucks. Tony Jr. asked for plaintiff's tools so that his brother Jimmy could fix the broken truck. Plaintiff got his tools and put them in the back seat of Tony Jr.'s car.

Plaintiff said: "You think you need any help?" Tony Jr. replied: "I don't know because my brother does most of the work on the trucks or his car." Plaintiff wanted to go along so Tony Jr. said: "You want to come with, you come on with." At this time Tony Sr. was at Maxwell Street, on 14th and Jefferson watching the truck to prevent theft of the produce.

Tony Jr. drove down Morgan for eight blocks before reaching Roosevelt; the highest speed he attained was twenty-five to thirty. When he got to the intersection of Roosevelt and Morgan the stoplight was red and he stopped behind two other cars; he was five feet behind the last car. When the light changed he proceeded into the intersection behind the other two cars. Both of the other cars made left turns and Tony Jr. was stopped preparing to make a left turn when the traffic light changed to amber. A car going east came through the intersection while the light was turning from amber to red and there was a collision. The other car, a Buick, ran into Tony Jr.'s car; the point of impact was the right front of Tony Jr.'s car. At the moment of impact Tony Jr.'s car was still stationary. After the accident the Buick was parked on the side but it had swerved off and hit the fire plug. Tony Jr.'s car ended up on the safety island.

After the accident Tony Jr. was taken to the hospital where he stayed for five hours. He saw plaintiff at the hospital and spoke to him there. He next spoke to plaintiff several days later at plaintiff's home. Plaintiff asked Tony Jr. to help him out with some rent money and Tony Jr. said he would.

Testimony of Anthony Bordenaro, Sr., a defendant

On the day of the accident one of Tony Sr.'s trucks broke down about a block from his fruit stand. He and his two sons

pushed the truck to the stand at 14th and Jefferson. He then sent Tony Jr. to get some tools to repair the truck because the steering rod had broken; after he left, Tony Sr. kept selling produce. He told Tony Jr. to go and get some tools so that his other son, Jimmy, who was a mechanic, could fix the truck.

Tony Sr. did not know that plaintiff was repairing another of his trucks; he did not know that one of his trucks was in front of plaintiff's house. He did not look to see if all his trucks were in the usual place in front of his store. He did not tell Tony Jr. where to get the tools; he just said: "Go out and get tools."

Testimony of Plaintiff in Rebuttal

During the noon recess on the last day of trial, he overheard defendants' attorney tell Tony Jr. to testify that he did not remember the statements given at his deposition in 1962.

OPINION

Defendants first contend that the verdict of the jury is against the manifest weight of the evidence and that therefore they are entitled to a new trial. They argue that their account of the accident is more reasonable and believable than plaintiff's.

Where, as in the instant case, the evidence is conflicting and cannot be reconciled, a verdict should not be set aside and a new trial granted because the jury could have found differently or because judges feel that other conclusions would be more reasonable. Kahn v. James Burton Co., 5 Ill. 2d 614; Dailey v. Hill, _____ Ill. App. 2d _____, 241 N.E.2d 683.

In the instant case the jury by its verdict indicated

that it believed the plaintiff's version of the facts, to wit, that plaintiff was picked up at his home by Tony Jr. and was being taken to fix the broken Bordenaro truck, that defendant drove very fast on his way to the broken truck, that defendant ran an amber light at the Roosevelt Road - Morgan Street intersection at a speed of seventy-two miles per hour, and that plaintiff was injured in the ensuing collision.

Defendants argue that plaintiff's testimony that the car was traveling seventy-two miles per hour is improbable and irreconcilable with other established facts. They contend that it is scientifically and physically impossible for an automobile traveling seventy-two miles per hour to be struck on the side and stop in the exact spot it was struck; that it would at least continue across Roosevelt and most likely end up half a block away. Therefore, argue defendants, plaintiff's testimony concerning the speed of defendant's car is scientifically impossible and must be disregarded. No expert testimony as to scientific impossibility was adduced and we cannot say that plaintiff's testimony as to speed was improbable and irreconcilable with "established facts." The evidence as to which car hit the other is conflicting. Both plaintiff and Tony Jr. were rendered unconscious at the time of the impact and therefore there is no eye-witness evidence as to the path of the cars from the time of the impact to the time Tony Jr. regained consciousness. His testimony concerning where the cars came to rest after the accident does not of itself show the improbability of plaintiff's testimony as to speed.

In the instant case the jury was faced with two conflicting and irreconcilable accounts of an accident, and we do not

feel that the jury rendered a verdict against the manifest weight of the evidence when it chose to believe plaintiff's account and disregard Tony Jr.'s in which he directly contradicted his statements at his deposition.

Defendants next argue that a new trial should be granted because of misconduct of counsel for the plaintiff. Defendants assert prejudice when counsel for the plaintiff asked Tony Jr. if a claim had been made against him by the passenger in the other car. Counsel for defendants objected to the question before it was answered and the trial judge sustained the objection and instructed the jury to ignore the question. This reference was not prejudicial for several reasons: first, because the question was never answered; second, because the question was asked in the course of establishing the taking of a deposition and of ascertaining who was present at that deposition; third, because juries realize that automobile accidents breed much litigation and thus are not influenced by the fact that a party is being sued by an outsider; and fourth, because the judge admonished the jury to ignore the question.

At a much later stage of the trial, counsel for plaintiff inquired of Tony Jr. if the driver of the other car in the accident sustained a head injury. An objection to this question was sustained. This reference also, while perhaps improper, is not prejudicial. The fact that another individual besides the litigants was injured in the accident would not, without more, affect the issue of defendants' negligence and liability.

Plaintiff's counsel asked Tony Jr. if anyone had told him to testify that he did not remember giving testimony at a deposition taken several years earlier; and he answered that

he had not been so instructed. This question and answer are not prejudicial to defendants because in the first place Tony Jr. denied the allegation; and in the second place because plaintiff's attorney connected it up when he introduced testimony that his client overheard defendants' counsel tell Tony Jr. to deny that he remembered giving the damaging deposition testimony.

Plaintiff also made several statements during his summation which defendant alleges were prejudicial. In Bulleri v. Chicago Transit Authority, 41 Ill. App. 2d 95, the court in discussing the law concerning improper arguments of counsel stated that where such arguments are so prejudicial as to deprive either party of a fair trial then a new trial is necessary. During summation plaintiff's counsel stated that plaintiff had worn a cervical collar for a year when the evidence in the record only established that plaintiff had purchased a collar and worn it without establishing any time period during which it was worn. Defendants' attorney objected to this, explaining the lack of evidence in the record, and the judge properly sustained the objection. This is in the nature of a slip by plaintiff's counsel which was corrected by the court, thus mitigating any prejudicial effect.

Plaintiff's attorney also told the jury that he did not put a doctor on the stand because a doctor could not have testified for certain whether or not plaintiff had headaches. An objection to this statement was overruled on the grounds that defendants' attorney had questioned the absence of a doctor's testimony from plaintiff's case and that plaintiff's attorney was only replying. It was proper for defendants' attorney to comment on the failure of plaintiff to present

doctors' testimony; but since, as defendants concede in their brief, there is no requirement of medical proof of a plaintiff's injuries in Illinois, a response to defendants' comment was properly allowed.

Plaintiff's attorney also said to the jury that defendant testified that he had stopped to eat on the way over to pick plaintiff up and thus was late returning to the fruit stand. There is no record of such testimony having been given. However, a misstatement of the testimony of a witness by counsel in his argument to the jury does not require reversal where the attorney was merely stating his recollection of the testimony and in view of the fact that it was for the jury to determine what had been testified to. Bolle v. Chicago & Northwestern Ry. Co., 258 Ill. App. 545, 561. Furthermore any potential prejudice was negated when defendants' counsel pointed out the misstatement and the judge informed the jury that it was their duty to determine what the testimony was.

The defendants contend that the Bulleri case, supra, is controlling and requires a new trial; however, we find Bulleri to be distinguishable from the instant case. In Bulleri the summation of counsel for plaintiff was laden with prejudicial statements, and the reviewing court found error in the rulings of the trial court overruling objections to the prejudicial statements. In the instant case the trial judge sustained objections and properly instructed the jury as we have pointed out.

Neither in the trial court nor in this court did defendants make any point on the question of right-of-way. Consequently, nothing in our opinion should be interpreted as construing the right-of-way statute relating to traffic lights, the language of which permits a vehicle to enter an intersec-

tion on the yellow light and requires the driver of a vehicle entering on a green light to yield the right-of-way nevertheless to vehicles lawfully within the intersection at the time the light turned to green. Ill. Rev. Stat., ch. 95-1/2, § 129.

Defendants also contend that the jury verdict of $2500 was excessive. We find no merit in this contention. The test of the propriety of the amount of damages awarded is not the amount of out of pocket expense but whether or not the amount of the verdict falls within the limits of fair and reasonable compensation. Sesterhenn v. Saxe, 88 Ill. App. 2d 2, 8; O'Keefe v. Lithocolor Press, Inc., 49 Ill. App. 2d 123. The jury's verdict with respect to the amount of damages will not be disturbed unless it appears that it was the result of prejudice or passion. Sesterhenn v. Saxe, supra. In the instant case plaintiff testified that he was taken unconscious to the hospital; that sixty-seven sutures were administered; that he went for treatment for two months; that he has a residual scar which swells in cold weather; that he wore a cervical collar (no length of time asserted); and that he has continuous headaches two or three times a week. We cannot say that the award was the result of prejudice or passion, nor can we find the award excessive in any manner. Indeed, in the case principally relied upon by defendants, Clarke v. Rochford, 79 Ill. App. 2d 336, the reviewing court reduced a judgment of $3,800 to $2500 for injuries less serious than those in the instant case.

[1] The trial court after considering defendants' extensive post-trial motions denied defendants' motion for a new trial, denied defendants' motion for judgment notwithstanding the verdict and also denied defendants' motion for a remittitur. We find no reversible error or any basis for a remittitur.

The judgment of the Circuit Court is affirmed.

AFFIRMED

McCormick and English, JJ., concur.

Abstract

No. 52572

106 I.A. 2-315

THE WALTER M. CARQUEVILLE COMPANY, an Illinois corporation, Plaintiff-Appellee,	
v.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
ALBERT G. GLADSTONE, HEN 'N HONEY CORPORATION, an Illinois corporation, and GRAVES S. URQUHART, Defendants,	HON. CHESTER J. STRZALKA PRESIDING.
and	
ALBRIGHT SALES CORPORATION, an Illinois corporation, and JERE ALBRIGHT, Defendants-Appellants.	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion by defendants Albright Sales Corporation and Jere Albright, individually (hereinafter referred to as Albrights) to set aside a default judgment obtained against them by plaintiff. Albrights contend that their motion presented a meritorious defense and a reasonable excuse for not having made such defense in due time and that the default should be set aside. The facts follow.

Albright Sales Corporation is engaged in the business of supplying specialty equipment to restaurants which use the Albright trade mark name, "Broasted Chicken." Albrights had previously arranged for menus to be supplied to their customers by a printer who charged the customers directly and paid a commission to Albrights. The art work and photographic copy for the menus was supplied by Albrights.

On July 21, 1966 plaintiff filed a complaint in which it alleged that defendants agreed to buy 10,000 menus,

that it delivered the menus to defendant Hen 'N Honey Corporation and that defendants refused to pay the sum of $633.40 due and owing for them. Appended to the complaint is a purchase order for 10,000 menus. It is signed by Albert Gladstone as agent for Hen 'N Honey Corporation and by Graves Urquhart, whose relation to the contract does not appear on the face of the document. Further pleadings indicate that Urquhart was the agent of plaintiff and we assume he signed the contract in that capacity. The purchaser is shown to be Hen 'N Honey Corporation and not Albright Sales Corporation.

On November 21, 1966 the court denied a motion by Albrights to dismiss the complaint and gave them 30 days within which to answer. Albrights had not filed their answer by January 18, 1967 and plaintiff moved for judgment by default. The court entered the motion and continued it to January 25, 1967. On January 25 Albrights' attorney exhibited defendants' answer to the court and alleged that it had not yet been verified because of the absence from the city of Jere Albright. The court continued the motion to January 30, 1967. Neither Albrights nor their attorney appeared in court on that date and the court entered judgment against them by default for $665.07. On January 31, 1967, forty days after the date on which their answer was due, Albrights filed an answer in which they denied the existence of a contract with plaintiff. Then on February 23, 1967 they filed a motion to set aside the default judgment, alleging that due to weather conditions on January 30, 1967 Jere Albright was unable to reach his attorney's office to sign the answer to plaintiff's complaint until late

in the afternoon and that his attorney filed the answer the following morning. Plaintiff filed an answer to Albrights' motion in which it alleged that both Jere Albright and his attorney live within a few miles of the court, that transportation was normal on January 30, that Albrights had engaged in delaying tactics for over six months after plaintiff filed its complaint and that the court acted within its discretion in entering the default judgment. The court denied the motion to set aside the default judgment and entered an order finding there was no just reason for delaying enforcement or appeal.

Albrights contend that their motion to set aside the default judgment presented a meritorious defense and a reasonable excuse for not having made the defense in due time and that the court erred in not having set aside the default. They further contend that the requirement of a showing of a reasonable excuse for not having made a meritorious defense in due time has been substantially softened under recent court rulings.

When a motion to set aside a default judgment is brought within thirty days, it should be viewed more liberally than one filed under Section 72 of the Civil Practice Act. Mc Dowell v. Jarnagin, 56 Ill. App. 2d 395, 206 N.E.2d 497; Widicus v. Southwestern Electric Coop., Inc., 26 Ill. App. 2d 102, 167 N.E.2d 799. That is not to say however that motions to vacate will be granted as a matter of course. Sarro v. Illinois Mut. Fire Ins. Co., 34 Ill. App. 2d 270, 181 N.E.2d 187. A motion to set aside a default judgment is addressed to the sound legal discretion of the trial court and must contain a showing that a meritorious defense can be made and that a reasonable excuse exists for the delay in making the defense. Mieszkowski v.

in the afternoon and that his attorney filed the answer the following morning. Plaintiff filed an answer to Albrights' motion in which it alleged that both Jere Albright and his attorney live within a few miles of the court, that transportation was normal on January 30, that Albrights had engaged in delaying tactics for over six months after plaintiff filed its complaint and that the court acted within its discretion in entering the default judgment. The court denied the motion to set aside the default judgment and entered an order finding there was no just reason for delaying enforcement or appeal.

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Norville, 61 Ill. App. 2d 289, 209 N.E.2d 358; McDowell v. Jarnagin, supra; Sarro v. Illinois Mutual Fire Ins. Co., supra.

In the case before us defendants' answer was due no later than December 21, 1966. No answer was on file when on January 18, 1967 plaintiff filed a motion for default judgment. The trial court entered the motion and continued it until January 25, 1967. On January 25 the court again continued the motion, this time to January 30. On January 30 neither defendants nor their attorney appeared and the court entered a default judgment against defendants. Defendants' excuse for failing to assert their defense in time was that "due to weather conditions beyond defendants' control, defendant Jere Albright was unable to reach the office of his attorneys for purpose of signing the Answer and Counter Claim prior to the closing of the courts on the 30th day of January, 1967." Plaintiff answered that "transportation was normal on January 30th." The trial judge was patently in better position than this court to decide whether the weather conditions could in fact have prevented Jere Albright from reaching his attorneys' office on January 30th. In any event the weather conditions should not have prevented defendants' attorney from traveling the short distance from his office to the court to respond to plaintiff's motion for default judgment. Weather conditions might provide an excuse for a few days delay, but in this case defendants were forty days late. The trial court did not abuse its discretion in refusing to set aside the default judgment.

JUDGMENT AFFIRMED

SULLIVAN, P.J. and DEMPSEY, J. concur.

Case No. 68-23

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1969

106 I.A.

MARVIN L. WALDRON and JEAN C. WALDRON, Plaintiffs-Appellants vs. LISSA MAE WALDRON and KATHRYN E. SNYDER, Defendants-Appellees	Appeal from the Circuit Court of Rock Island County, Illinois County Division. Honorable Robert M. Bell, Judge Presiding.

Abstract

STOUDER, P.J.

Plaintiffs, Appellants, Marvin and Jean Waldron, commenced this adoption proceeding in the Circuit Court of Rock Island County seeking to adopt Lissa Mae Waldron, the daughter of Kathryn Snyder. Plaintiffs are respectively the step-father and mother of defendant Kathryn Snyder. After hearing the court denied the adoption petition and this appeal follows.

As a basis for the adoption the petition in paragraph seven thereof alleges "That Kathryn E. Snyder, who has authority to consent to the adoption of said child by petitioners, is an unfit person to have said child for the following reasons: 1. Open and notorious adultery or fornication. 2. Extreme and repeated cruelty to the child. 3. Abandonment of the child. 4. Desertion of the child for more than three months next preceding the commencement of this action. 5. Other neglect of, or misconduct toward the child."

The child sought to be adopted was born August 31, 1965, her mother Kathryn Snyder being unmarried at the time. Kathryn Snyder was thereafter married to a person not the father of the child in November, 1966. She lived with her husband

until about January 1967 and during such period she conceived a child not the child of her husband. During the period of her pregnancy, defendant went to California to live with an aunt and left her daughter, who is the subject of this proceeding, with plaintiffs. Approximately three months later plaintiffs brought this proceeding.

In seeking to reverse the order of the trial court denying the petition for adoption, plaintiffs' principal argument is that the order is not in accord with the evidence.

The facts we have heretofore set forth represent only a bare outline of the evidence. Without detailing such evidence we believe it is sufficient to say that the record discloses a rather sordid family background, admissions of sexual promiscuity, recriminations by the parties and evidence that defendant was attempting to re-establish and reorganize her life in California.

Plaintiffs argue that defendant was guilty of open and notorious adultery and abandonment or desertion as a matter of law relying on Stalder v.Stone, 412 Ill. 488, 107 N.E. 2d 606. At the outset it should be observed that the court in Stalder affirms the action of a trial court in granting an adoption upon the facts presented and to this extent it does not necessarily follow that the trial court would have committed reversible error had it decided to the contrary. The facts in the Stalder case are substantially different from those presented in the instant case and we believe the decision recognizes that sexual promiscuity neither constitutes open and notorious adultery as contemplated by the adoption statute nor in and of itself necessarily renders a parent unfit. Furthermore the trial court is entitled to view the conduct of the defendant in this regard as it may or may not have affected the welfare of the child.

We also believe the evidence supports the trial court's conclusion that the child was left by defendant with plaintiffs only temporarily and not with any intention to abandon or desert the child. The circumstances surrounding the leaving of the child with defendant's mother, including the reasons therefor and the short period of time involved, are not indicative of any intent on the part of defendant

to disregard her duties and responsibilities toward the child. Hill v. Allabaugh, 333 Ill. App. 602, 78 N.E. 2d 127.

Plaintiffs also argue that the trial court failed to consider the financial ability of the parties in so far as such factors related to the best interest of the child involved. It is true that the financial ability of the parties is one factor to be considered by the court in determining what may be best for a child. Cormack v. Marshall, 211 Ill. 519, 71 N.E. 1077. The record reveals a disparity in the means of the parties to take care of the child involved, but in considering the comments of the court within the context in which they were made, we believe it can be fairly said that the trial court believed such disparity in means was not in and of itself a sufficient reason for granting the adoption.

Lastly plaintiffs argue that the welfare of the child requires the adoption be granted. It is apparent from the record that the trial court was faced with a difficult decision. Whatever disposition it made of the adoption petition the prospects for the future well being of the child were indeed dim. The conduct of defendant was far from exemplary and could not be condoned. Yet such conduct was at least in part the result of an unsatisfactory background. The trial court concluded that the defendant was attempting to re-establish and reorganize her life free from the influences which had produced the present state of affairs. That such new circumstances and surroundings would be for the best interest of the child is we believe supported by the evidence and the decision of the court is not palpably erroneous.

For the foregoing reasons the decree of the Circuit Court of Rock Island County is affirmed.

DECREE AFFIRMED.

Alloy, J., and
Culbertson, J. concur.

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Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

A

BRUNO GARSHVA, Plaintiff-Appellee, v. CITY OF ROCKFORD, a Municipal corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of Winnebago County, Illinois.

MR. PRESIDING JUSTICE ABRAHAMSON DELIVER THE OPINION OF THE COURT.

The Circuit Court of Winnebago County entered a declaratory judgment finding that the single residence classification of the City of Rockford Zoning Ordinance as applied to plaintiff's property was unreasonable and void and that the plaintiff was legally entitled to use the subject premises for the purpose of constructing and maintaining a dental office building as proposed by him, subject to the condition that the vehicular ingress and egress from said premises be to Dempster Road and not from or to East State Street. From this judgment the City of Rockford, defendant, takes this appeal.

The subject property is located at the southeast corner of Dempster and East State Street in the City of Rockford. The property has a frontage on East State Street of 190 feet and on Dempster Road of 123 feet. The lot is improved with a single residence home and has been for a considerable period of time. East State Street is a four-lane heavily traveled thoroughfare also known as Illinois

State Route 20, on which a traffic count runs close to 16,000 cars per day. Dempster Road runs into East State Street from the South but does not cross it. Dempster Road carries relatively little traffic as compared to East State Street. The north side of East State Street is predominantly zoned for business. All three other corners of the junction of East State Street and Dempster Road are zoned for local business, as is most of the property to the south of East State Street to the west of the subject property. A short distance to the south of the subject property the zoning is "C" residential, being for multiple dwellings. To the east of the subject property on the south side of East State Street there are four or five single homes beyond which the zoning is mixed and there is a tailor shop, a business supply office, a fruit store, a garage and a photography shop. There has been no new residential construction in this area facing on East State Street for more than 15 years. Plaintiff's intended use of the subject property is to construct a dental office building.

Bruno Garshva, plaintiff, testified that he was the owner of the subject property but that legal title was actually held by the Illinois National Bank & Trust Company as Trustee for him. The evidence showed that plaintiff's property under the present zoning is valued at $25,000.00. The estimated value of the property if rezoned in accordance with plaintiff's request would be in excess of $80,000.00. There was no evidence as to what effect, if any, the reclassification of this property for the requested use would have upon the values of the adjacent and nearby properties which are zoned

for single family residences.

The defendant attacks the judgment of the trial court for the following reasons:

> 1. That the evidence shows that plaintiff, Bruno Garshva, is not the owner of the property involved and that therefore, no "actual controversy" between "parties interested" exists, under the declaratory judgment act, ch. 110, sec. 57.1 (Ill. Rev. Stat.).
>
> 2. That the judgment is against the manifest weight of the evidence.
>
> 3. That the fixing of zoning boundaries are peculiarly within the province of the legislature and that under the facts these boundaries cannot be said to be unreasonable and unfair.

We do not find it necessary, for the reasons which will be hereinafter expressed, to determine whether plaintiff, Bruno Garshva, is a proper party as that is a matter which can be readily corrected by a simple amendment to the complaint.

The general principles relating to zoning have been reviewed and repeated by this court in many cases. Since the early decision in City of Aurora v. Burns, 319 Ill. 84, the factual situation presented to the court is generally the same as the instant case, i.e. whether plaintiff's property is in the proper zoning district and classification.

From the many cases heretofore decided, there have developed several rules as to what a petitioner should prove and as to what evidence he must present to meet his burden of proof. In Burkholder v. City of Sterling, 381 Ill. 564, 568, the Court stated:

> "It has been repeatedly stated by this court that it will not constitute itself a zoning commission and that all questions relative to the wisdom or desirability of particular restrictions in a zoning ordinance rest with the legislative bodies creating them and that a finding will not be disturbed where there is ground for a legitimate difference of opinion concerning the reasonableness of a particular

> ordinance. (citations omitted) It is not the province of courts to interfere with the discretion of the legislative body in the absence of a clear showing of an abuse of a discretion vested in them. (citations omitted) Where the advisability of restricting a particular area for a particular use is debatable, this court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. (citations omitted)"

In Stemwedel v. Village of Kenilworth, 14 Ill: 2d 470, 474, the court stated:

> "But to sustain the burden of proving invalidity of the restriction it is not enough to show that it works a hardship on the owner, or that a desired variation would not substantially impair the public health, safety, comfort, morals, or general welfare. One who assails its constitutionality as applied to a particular property must prove by clear and affirmative evidence that it constitutes arbitrary, discriminatory, or unreasonable municipal action, and that it will not promote the safety and general welfare of the public. (citations omitted) A presumption favoring validity always obtains where the proper authorities adopt a zoning ordinance pursuant to a legislative grant, and the burden is on the property owner to overcome it. (citations omitted)."

In reviewing the record before us we find that plaintiff presented evidence only that he wished to construct a dental office building and submitted only a plot plan of the project. The subject property is adjacent to a residential area. No plans or specifications were introduced into evidence that would permit the court to determine that the proposals of the plaintiff were reasonable and that the refusal of the city to grant the request for rezoning was unreasonable.

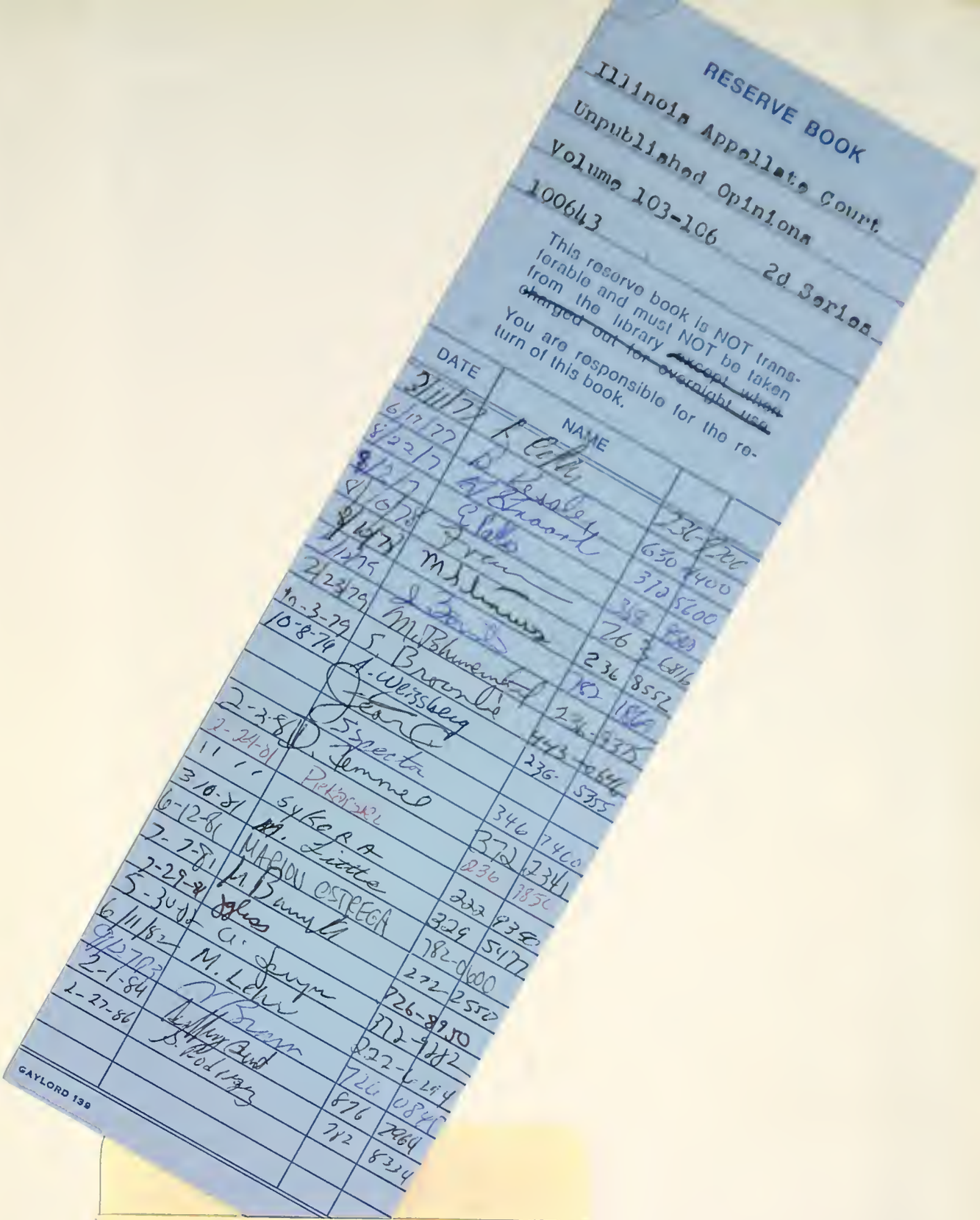
Insofar as the court decreed the single residence classification unreasonable and void as applied to plaintiff's property, and that he was legally entitled to use the premises for the purpose of

constructing and maintaining a dental office as proposed by him, the decree is improper in that it is too broad. We are of the opinion that the case should be remanded and plaintiff should be required to submit proof as to the reasonableness of his proposed building and submit sufficient plans and specifications of the proposed dental office building so that the trial court may determine whether plaintiff's proposals are compatible with the general character of the surrounding neighborhood. Sinclair Pipe Line v. Richton Park, 19 Ill. 2d 370, 377 (1960); Fiore v. City of Highland Park, 76 Ill. App. 2d 62 (1966); Harshman v. City of DeKalb, 64 Ill. App. 2d 347 (1965).

The judgment of the trial court is therefore reversed and this case is remanded for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED
WITH INSTRUCTIONS.

MORAN and DAVIS, JJ., concur.



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